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10 IN THE UNITED STATES DISTRICT COURT
11 FOR THE DISTRICT OF ARIZONA

12 United States of America,

13 Plaintiff,

14 v.

16 Abdul Malik Abdul Kareem,

17 Defendant.

12 No. CR-15-00707-01-PHX-SRB

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14 **MOTION FOR LEAVE TO FILE SUR-
15 REPLY**

16 The United States, through undersigned counsel, respectfully request the Court
17 grant it leave to file a sur-reply to address new arguments and allegations in defendant
18 Kareem's Reply to Government's Response to Defendant's Supplemental Motion for New
19 Trial (CR 559) and Declaration of Daniel D. Maynard (CR 559-1.). In his reply, Kareem
20 asserted new arguments that were not part of his original Supplemental Motion (CR 505)
21 or his Addendum to the motion (CR 543) and attached a new, 19-page declaration from
22 counsel, Daniel D. Maynard. The Maynard Declaration contains counsel's interpretations
23 of various pieces of evidence and testimony not previously addressed in the Supplemental
24 Motion or Addendum. The declaration contains self-serving interpretations and argument
25 that add to the content of the Reply without causing it to further exceed the page limit. The
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1 inclusion of new arguments and factual allegations has deprived the government an
2 opportunity to respond to those matters. Therefore, the government respectfully requests
3 leave to file a sur-reply to address the new arguments and allegations. *Cf. United States v.*
4 *Graves*, 925 F.3d 1036, 1039 n.2 (9th Cir. 2019) (considering new argument when issue
5 fully developed after supplemental briefing); *Eberle v. City of Anaheim*, 901 F.2d 814, 818
6 (9th Cir. 1990) (“[A]ppellants cannot raise a new issue for the first time in their reply
7 briefs.”).

8 Specifically, Kareem advances the following new arguments and allegations in the
9 Reply that were not set forth in the Supplemental Motion or the Addendum:

10 1. The government used Saabir Nurse’s phone records during the trial against
11 Abdul Khabir Wahid; therefore, the information from the phone would have been relevant
12 to Kareem’s defense in his trial. (CR 559 at 7.)

13 2. The government called Mustafa Hassan during Kareem’s trial to testify about
14 Kareem’s having been with Simpson and Soofi on April 30, 2015, in order to create the
15 implication “that they were together planning the attack.” (CR 559 at 4.)

16 3. The content from Nurse’s phone showed that Nurse visited Wahid’s
17 apartment on May 6, 2015, at 2:27 a.m. Further, the content “confirms that Kareem did
18 not communicate much with Nurse and it further shows the relationship between Nurse
19 and Wahid.” (CR 559 at 7.)

20 4. Nurse’s travel out of the country from May 28, 2015, until September 26,
21 2015, “was material to bolster the argument . . . that he did not need a job and one could
22 infer that he left the country due to his concern about the Garland attack until he learned
23 that Kareem had been arrested.” (CR 559 at 7-8.)

24 5. Special Agent Whitson testified during the Kareem trial that FBI agents again
25 interviewed Nurse following a meeting Whitson held with those agents after the discovery
26 of the letter from Simpson to Nurse. No documentation of those interviews has been
27 produced. (CR 559 at 9; 559-1 at 6.)

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1 6. Special Agent Kim Jensen testified during the Wahid trial about the
2 importance of the FBI's having learned that Wahid gave Nurse a key and an envelope
3 believed to contain the title to Simpson's car and a letter from Simpson to Nurse. "Based
4 on SA Jensen's testimony, it is only logical that the FBI conducted further investigation in
5 to Nurse before Kareem's trial or it should have to explain why not. . . . [I]t appears the
6 FBI purposely may have waited until after Kareem's trial to conduct its investigation of
7 Nurse." (CR 559 at 9-10.)

8 7. The defense received no explanation on why the tactical intel report
9 (previously described as a "lookout") was created in March 2015. If Simpson was under
10 surveillance in March 2015 it would "show little connection between Simpson and Kareem
11 and put the lie to much of [A.S.'s] testimony." (CR 559 at 10-11.)

12 8. "The testimony of [A.S.] in *Wahid* is inconsistent with his testimony in
13 Kareem's case" (CR 559 at 13; 559-1 at 16.)

14 9. The prosecutor's opening statement in the Hendricks trial is a party
15 admission, and "logic suggests that having made a statement to one effect on a given issue
16 should estop that party from later asserting a contrary position." (CR 559 at 14 n.2.)

17 The government respectfully disagrees with the foregoing new arguments and
18 allegations. Further none of the issues presented falls within the scope of the government's
19 discovery obligations under Rule 16, *Brady v. Maryland*, 373 U.S. 83 (1963), *Giglio v.*
20 *United States*, 405 U.S. 150 (1972), or any other doctrine.

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Given the inaccuracies of the new arguments set forth in the reply, the government respectfully requests leave to file a sur-reply addressing those arguments. Undersigned counsel have contacted Daniel Drake, counsel for the defendant, who stated the defense does not object to this motion.

5 | Respectfully submitted this 12th day of July, 2019.

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District of Arizona

s/ Kristen Brook
s/ Joseph E. Koehler
KRISTEN BROOK
JOSEPH E. KOEHLER
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CERTIFICATE OF SERVICE

13 I hereby certify that on the 12th day of July, 2019, I electronically filed the
14 foregoing with the Clerk of Court using the CM/ECF system, and that true and accurate
copies have been transmitted electronically to counsel for the defendant via the ECF
system.

15 Daniel Drake & Daniel Maynard, Attorneys for Defendant

16 By: /s *Joseph E. Koehler*